A

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08–166 OF 2005(W)

AHMAD FAIRUZ CHIEF JUSTICE, PS GILL, ALAUDDIN, RICHARD MALANJUM AND AUGUSTINE PAUL FCJJ

18 APRIL 2006

C

Civil Procedure — Appeal — Right of appeal — Whether order appealable — Whether order made under s 44(1) of Courts of Judicature Act 1964 appealable — Whether only order decided by the High Court on merits were appealable — Whether appeal had become academic, test to be applied

D

Civil Procedure — Judicial precedent — Court of Appeal — Doctrine of binding precedent — Whether Court of Appeal necessarily follow Federal Court judgment although wrongly decided

E

Metramac Corp Sdn Bhd ('the applicant') was the defendant in an action initiated against them by Fawziah Holdings Sdn Bhd ('the respondent'). The respondent's claim was for, inter alia, alleged loss of advertising rights and loss of income earned by the applicant from future contracts performed by the applicant. On 21 October 2003, the High Court found the applicant liable to the respondent for loss of advertising rights. Both the parties appealed to the Court of Appeal. In the meanwhile, the respondent had filed a motion in the Court of Appeal under s 44(1) of the Courts of Judicature Act 1964 ('s 44(1)') seeking, inter alia, for an order that the respondent be restrained from disposing its assets to frustrate the appellant's claim against the respondent. The Court of Appeal allowed the order on 25 October 2005. The applicant, being dissatisfied, filed a motion for leave to appeal to the Federal Court against the order. The Court of Appeal delivered its judgment on the substantive appeal on 12 January 2006 allowing the respondent's appeal.

F

G

H The hearing before this court was the motion for leave to appeal against the orders made on 25 October 2005. Learned counsel for the respondent raised a preliminary objection to the effect that as the orders had been dissolved, there was no longer any dispute between the parties and the appeal was therefore academic. In his reply, learned counsel for the applicant contended that the dissolution of the orders did not render the appeal academic as they still affect his clients. He said that if his appeal was allowed it would have a bearing, inter alia, on the undertaking in damages given by the respondent.

I

The next matter for consideration was whether the orders made by the Court of Appeal on 25 October 2005 under s 44(1) were appealable under s 96(a). The issue was whether s 96(a) should be construed restrictively on policy considerations to

limit the right of appeal to the Federal Court to only a judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court on the merits. The Court of Appeal had ruled that an order made under s 44(1) was made in the exercise of the original jurisdiction of the Court of Appeal and therefore appealable.

Held, granting leave to appeal:

(1) The test in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative, the appeal cannot be said to have become academic (see para 9). If the present appeal was ruled to be academic, it would seriously affect the undertaking in damages given by the respondent. It followed that the fact that the orders had been dissolved could not render the appeal academic (see paras 10 & 11).

(2) What has been legislated to be appealable under s 96(a) are judgments or orders of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction subject to fulfillment of the prescribed conditions (see para 36). It is clear that the word 'any' in s 96(a) makes it applicable to every judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction. The judgments or orders of the Court of Appeal against which there can be an appeal are unqualified provided that they are in respect of any matter decided by the High Court. There is no requirement that the judgments or orders must be ones that have been decided by the High Court on the merits. The language of s 96(a) is plain enough to include matters decided by the Court of Appeal provided they are in respect of a matter decided by the High Court. The use of the words 'in respect of' in s 96(a) makes it clear that what is required is that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction (see para 52).

(3) The wide language employed in s 96(a) together with the internal mechanism contained in it makes it patent that it is the legislative intent to exclude a restrictive interpretation of the section (see para 52). Thus any restriction imposed on the right of appeal provided by s 96(a) in the absence of express words or necessary implication would defeat its object. It follows that any attempt to confine s 96(a) to only judgments or orders decided by the High Court on the merits cannot be justified. Therefore, the motion filed by the applicant for leave to appeal against the orders made by the Court of Appeal on 25 October 2005 was thus regular and competent (see para 53).

(4) Gopal Sri Ram JCA at the Court of Appeal was therefore correct in saying that *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 were wrongly decided. Unfortunately, he was not the right authority permitted by

law to express such an opinion. As both cases were judgments of the Federal Court, he was bound to follow them whether he agreed with them or not (see para 54).

[Bahasa Malaysia summary

Metramac Corp Sdn Bhd ('pemohon') adalah defendan dalam satu tindakan yang dimulakan terhadap mereka oleh Fawziah Holdings Sdn Bhd ('responden'). Tuntutan responden adalah untuk, antara lain, kehilangan hak pengiklanan dan kehilangan mata pencarian yang dikatakan oleh pemohon untuk kontrak-kontrak masa hadapan yang dilaksanakan oleh pemohon. Pada 21 Oktober 2003, Mahkamah Tinggi mendapati pemohon bertanggungjawab kepada responden untuk kehilangan hak-hak pengiklanan. Kedua-dua pihak telah merayu ke Mahkamah Rayuan. Sementara itu, responden telah memfailkan satu usul di Mahkamah Rayuan di bawah s 44(1) Akta Mahkamah Kehakiman 1964 ('s 44(1)') memohon, antara lain, untuk satu perintah bahawa responden disekat daripada menjual aset-asetnya untuk mengecewakan tuntutan perayu terhadap responden. Mahkamah Rayuan telah membenarkan perintah itu pada 25 Oktober 2005. Pemohon, berasa tidak puas hati, telah memfailkan satu usul untuk kebenaran merayu ke Mahkamah Persekutuan terhadap perintah itu. Mahkamah Rayuan telah menyampaikan penghakimannya berhubung rayuan substantif tersebut pada 12 Januari 2006 membenarkan rayuan responden.

Perbicaraan di hadapan mahkamah ini adalah usul untuk kebenaran merayu terhadap perintah-perintah yang dibuat pada 25 Oktober. Peguam yang bijaksana bagi pihak responden telah menimbulkan satu bantahan awal di mana memandangkan perintah-perintah tersebut telah dibatalkan, tiada lagi apa-apa pertikaian antara pihak-pihak dan rayuan tersebut menjadi akademik. Dalam jawapannya, peguam yang bijaksana bagi pihak pemohon menegaskan bahawa pembatalan perintah-perintah tersebut tidak menjadikan rayuan itu akademik kerana ia masih boleh menjejaskan anak guamnya. Beliau mengatakan bahawa jika rayuannya dibenarkan ia akan mempunyai kaitan, antara lain, kepada akujanji dalam ganti rugi yang diberikan oleh responden.

Perkara lain untuk dipertimbangkan adalah sama ada perintah-perintah tersebut yang dibuat oleh Mahkamah Rayuan pada 25 Oktober 2005 di bawah s 44(1) boleh dirayu di bawah s 96(a). Persoalannya adalah sama ada s 96(a) patut ditafsirkan secara terbatas berdasarkan pertimbangan polisi untuk mengehadkan hak-hak rayuan ke Mahkamah Persekutuan kepada satu penghakiman atau perintah Mahkamah Rayuan berkaitan apa-apa kausa atau perkara sivil yang diputuskan oleh Mahkamah Tinggi berdasarkan merit. Mahkamah Rayuan telah memutuskan bahawa satu perintah yang dibuat di bawah s 44(1) telah dibuat menggunakan bidang kuasa asal Mahkamah Rayuan dan oleh itu boleh dirayu.

Diputuskan, memberikan kebenaran untuk merayu:

(1) Ujian untuk memutuskan sama ada satu rayuan itu telah menjadi akademik adalah untuk menentukan sama ada wujud satu kontroversi antara pihak-pihak yang akan menjejaskannya dalam apa cara. Jika jawapan kepada persoalan itu

adalah positif, rayuan itu tidak boleh dikatakan telah menjadi akademik (lihat perenggan 9). Jika rayuan semasa telah diputuskan sebagai akademik, ia akan menjejaskan akujanji dalam ganti rugi yang diberikan oleh responden. Oleh itu fakta bahawa perintah-perintah tersebut telah dibatalkan tidak menjadikan rayuan itu akademik (lihat perenggan 10 & 11).

(2) Apa yang telah digubal sebagai boleh dirayu di bawah s 96(a) adalah penghakiman atau perintah Mahkamah Rayuan berkaitan apa-apa kausa atau perkara sivil yang diputuskan oleh Mahkamah Tinggi dalam menggunakan bidang kuasa asalnya tertakluk kepada penyempurnaan syarat-syarat yang ditetapkan (lihat perenggan 36). Adalah jelas bahawa perkataan 'any' dalam s 96(a) membuat ia boleh dirayu kepada setiap penghakiman Mahkamah Rayuan berkaitan apa-apa kausa atau perkara sivil yang diputuskan oleh Mahkamah Tinggi menggunakan bidang kuasa asalnya. Penghakiman atau perintah Mahkamah Rayuan terhadap mana terdapat rayuan tidak layak dengan syarat ia berkaitan apa-apa perkara yang telah diputuskan oleh Mahkamah Tinggi. Tiada keperluan bahawa penghakiman atau perintah itu suatu yang telah diputuskan oleh Mahkamah Tinggi berdasarkan merit. Bahasa s 96(a) adalah jelas untuk merangkumi perkara-perkara yang diputuskan oleh Mahkamah Rayuan dengan syarat ia berkaitan suatu perkara yang telah diputuskan oleh Mahkamah Tinggi. Penggunaan perkataan 'in respect of' dalam s 96(a) menjadikan ia jelas bahawa apa yang dikehendaki adalah perlunya ada kaitan antara penghakiman atau perintah Mahkamah Rayuan dan kausa atau perkara sivil yang diputuskan oleh Mahkamah Tinggi dalam menggunakan bidang kuasa asalnya (lihat perenggan 52).

(3) Bahasa yang luas digunakan dalam s 96(a) bersama mekanisme dalaman yang terkandung dalamnya menjadikannya jelas bahawa ia adalah niat badan penggubal untuk mengecualikan satu pentafsiran terbatas seksyen itu (lihat perenggan 52). Oleh itu apa-apa sekatan yang dikenakan atas hak untuk merayu yang diperuntukkan oleh s 96(a) dalam ketiadaan perkataan nyata atau implikasi yang perlu akan menggagalkan objektifnya. Oleh itu apa-apa percubaan untuk menyekat s 96(a) kepada hanya penghakiman atau perintah yang diputuskan oleh Mahkamah Tinggi berdasarkan merit tidak boleh dijustifikasikan. Oleh itu, usul yang difailkan oleh pemohon untuk kebenaran merayu terhadap perintah-perintah yang dibuat oleh Mahkamah Rayuan pada 25 Oktober 2005 adalah menurut aturan dan kompeten (lihat perenggan 53).

(4) Gopal Sri Ram HMR di Mahkamah Rayuan adalah betul apabila mengatakan bahawa *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 dan *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 telah diputuskan dengan salah. Bagaimanapun, beliau tidak mempunyai kuasa yang betul yang dibenarkan oleh undang-undang untuk menyatakan pendapat sedemikian. Oleh kerana kedua-dua kes tersebut adalah penghakiman Mahkamah Persekutuan, beliau terikat untuk mengikutnya sama ada beliau bersetuju atau tidak dengannya (lihat perenggan 54).]

Notes

For cases on Court of Appeal, judicial precedent, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3827–3828.

A For cases on right of appeal, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1293–1306.

Cases referred to

Aerlinte Eireann Teoranta v Canada (Minister of Transport) (1990) 68 DLR (4th) 220 (refd)
B *Ainsbury v Millington* [1987] 1 All ER 929 (refd)
Albon v Pyke (1842) 4 M & G 421 (refd)
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 (refd)
Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)
C *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 (folld)
Cassell & Co Ltd v Broome & Anor [1972] 1 All ER 801 (refd)
Chinery, Ex parte (1884) 12 QBD 342 (refd)
Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors [1999] 1 MLJ 257 (refd)
D *Food Corp of India v Antelizo Shipping Corp* [1988] 2 All ER 513 (refd)
Goh Teng Hoon & Ors v Choi Hon Ching [1987] 1 MLJ 95 (refd)
Graham v Campbell (1878) 7 Ch D 490 (refd)
Housing of the Working Classes Act 1890, Re; ex p Stevenson (1892) 1 QB 609 (refd)
Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 4 MLJ 1 (folld)
E *Laxmana Rao v China* AIR 1980 Andh Pra 191 (refd)
Lee v Showmen's Guild of Great Britain [1952] 1 All ER 1175 (refd)
Madhav Rao Scindia v Union of India AIR 1971 SC 530 (refd)
Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh [1992] 1 MLJ 147 (refd)
F *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 (refd)
Nathu Prasad v Singhai Kepurchand 1976 Jab LJ 340 (refd)
Newby v Harrison (1861) 3 De GF & J 287 (refd)
Periasamy s/o Sinnappen v PP [1996] 2 MLJ 557 (refd)
Prosunno Coomar Paul v Koylash Chunder Paul 8 WR 428 (refd)
R v Secretary of State for Health & Ors [2001] 1 WLR 127 (refd)
G *Ram Narain v State of UP* AIR 1957 SC 18 (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513 (refd)
Ross v Buxton (1888) WN 55 (refd)
Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia [2006] 1 MLJ 403 (refd)
H *Sockalinga Mudaliar v Eliathamby & Anor* [1952] MLJ 77 (refd)
Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469 (refd)
Ushers Brewery Ltd v PS King & Co [1971] 2 All ER 468 (refd)
Vacker & Sons Ltd v London Society of Compositors [1913] AC 117 (refd)

Legislation referred to

I Courts of Judicature Act 1964 ss 3, 44(1), (2), 68(1)(a), 96(a)
Rules of the High Court 1980 Form 87(c)

Appeal from: Civil Appeal No W–02–1009 of 2003 (Court of Appeal, Putrajaya)

Dato' Muhammad Shafee Abdullah (S Sivaneindiren, Kaushalya Rajathurai, Jeffrey John, Teh Eng Lay, Tiffany Lim, Peter Skelchy and Chan Kwai Chuan with him) (Cheah Teh & Su) for the applicant.

Dato' Dr Cyrus Das (Benjamin Dawson, Steven Thiru, David Mathew, Koh San Tee and Noraisyah Abu Bakar with him) (Noraisyah & Co) for the respondent.

Augustine Paul FCJ (delivering judgment of the court):

[1] Metramac Corporation Sdn Bhd ('the applicant') is the Defendant in an action initiated against them by Fawziah Holdings Sdn Bhd ('the respondent') vide Kuala Lumpur High Court Civil Suit No D5–22–110 of 1995. The respondent's claim is for, inter alia, alleged loss of advertising rights and loss of income earned by the applicant from future contracts performed by the applicant. The applicant filed a counterclaim seeking, inter alia, various orders to declare null and void the agreements upon which the respondent's claim was premised. On 21 October 2003, the High Court found the applicant liable to the respondent for the loss of advertising rights. However, damages were to be assessed by taking into consideration the advertising rights that may possibly exist under the replacement concession agreement. All other claims of the applicant were dismissed. The respondent's claim for loss of future contracts was also dismissed as being void for uncertainty.

[2] Both the parties appealed to the Court of Appeal. The applicant's appeal was registered as Civil Appeal No W–02–1013 of 2003 and the respondent's appeal as Civil Appeal No W–02–1009 of 2003. The appeals were heard together on 30 August 2005 by a panel consisting of Gopal Sri Ram JCA, Hashim Yusoff JCA and Zulkefli Makinudin JCA. Judgment was reserved to a date to be fixed.

[3] In the meanwhile, the respondent had filed a motion in the Court of Appeal seeking, inter alia, the following orders pursuant to s 44(1) of the Courts of Judicature Act 1964 ('s 44(1)'):

(a) an order that the respondent and/or its directors, servants and/or agents or whosoever otherwise be restrained from disposing, conveying and/or dealing with the assets of the respondent in any manner that would frustrate, prejudice and/or defeat the appellant's claim against the respondent;

(b) alternatively, an order that the respondent set aside a sum of RM165m in a joint account of the Appellant and the respondent to satisfy the judgment that may be obtained in the appeal.

[4] The motion was heard on 25 October 2005 before Gopal Sri Ram JCA, James Foong JCA and Zulkefli Makinudin JCA who granted the following orders:

(a) that the respondent be and are hereby restrained whether by their servants or agents or howsoever otherwise from disposing of or dissipating any of their assets within the jurisdiction, including monies which they may receive hereafter up to a limit of RM100m until further order;

A (b) that costs herein is to follow the event of the appeal;

(c) that the penal notice under Form 87(c) of the Rules of the High Court 1980 be endorsed unto this order.

B **[5]** The applicant, being dissatisfied, filed a motion for leave to appeal to the Federal Court against the orders on 21 November 2005. It was originally fixed for hearing on 22 February 2006 and was adjourned to 6 March 2006 to enable the respondent to file an affidavit in reply.

C **[6]** The Court of Appeal delivered its judgment on the substantive appeal on 12 January 2006 allowing the respondent's appeal in Civil Appeal No W–02–1009 of 2003 and dismissing the applicant's appeal in Civil Appeal No W–02–1013 of 2003. The applicant filed two motions. One was in the Federal Court for leave to appeal against both the orders and the other was in the Court of Appeal for a stay of execution of the orders made on 12 January 2006. The respondent then filed a D motion to, inter alia, increase the sum upon which the injunction applied to RM200m. The respondent also applied for particulars and the appointment of an external monitoring accountant. The application was heard by the Court of Appeal on 23 February 2006. On 1 March 2006, the court granted a conditional stay on the following terms:

E (a) stay of execution and enforcement of the order and judgment dated 12 January 2006 made in the Court of Appeal pursuant to Civil Appeal No W–02–1009 of 2003 is hereby granted pending the disposal of the applicant/Respondent's application for leave to appeal to the Federal Court subject to the following terms:

F (i) that the applicant/respondent set aside a sum of RM50m in a joint account of the appellant and the applicant/respondent within one month from 1 March 2006 and/or before 4pm on 31 March 2006;

(ii) that the applicant/respondent do forward to the appellant within 14 days G from the date of the order, an affidavit affirmed by any one of its directors which contains full details of all assets or interest of the applicant/respondent as at 25 October 2005 and the date of this order, whether movable asset or immovable asset, whether tangible asset or intangible asset, whether within or outside jurisdiction of this honourable H court, in the name of the applicant/respondent, the applicant/respondent's agents and/or nominees, whether solely owned or jointly owned by the applicant/respondent including but not limited to:

(1) the precise nature of the relevant asset and interest in question;

I (2) where the relevant asset and interest in question is located;

(3) who is the legal and/or beneficial owner of the relevant asset and interest in question;

(4) whether the owner of the relevant asset and interest in question holds ownership of that asset and interest as nominee and/or for the benefit

of any other party and if it is, the name, address and full particulars of the principal or the beneficiary of that asset or interest;

(5) whether there is any mortgage, charge, security or any encumbrance on the asset or interest in question;

(6) whether there is any claimant to the asset or interest in question;

(7) full details of all dealings with the aforesaid assets between 25 October 2005 and the date of this order.

(b) costs of this application in encl (46a) be costs in the cause;

(c) parties are at liberty to apply.

The orders made on 25 October 2005 were also dissolved.

[7] The hearing before us is the motion for leave to appeal against the orders made on 25 October 2005. Learned counsel for the respondent raised a preliminary objection to the effect that as the orders have been dissolved there is no longer any dispute between the parties and the appeal is therefore academic. He added that there can be no appeal over matters that have been discarded or dissolved. He then said that as there must be an order in existence for the purpose of an appeal under s 96(a) of the Courts of Judicature Act 1964 ('s 96(a)') this court has no jurisdiction to proceed with the appeal. However, he conceded that the orders in question were valid from 25 October 2005 to 1 March 2006. In support of his argument he referred to cases such as *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469; *Ainsbury v Millington* [1987] 1 All ER 929; *Food Corp of India v Antelizo Shipping Corp* [1988] 2 All ER 513 and *R v Secretary of State for Health & Ors* [2001] 1 WLR 127. In his reply, learned counsel for the applicant contended that the dissolution of the orders does not render the appeal academic as they still affect his clients. He said that if his appeal is allowed it will have a bearing, inter alia, on the undertaking in damages given by the respondent.

[8] In dealing with the circumstances in which an appeal will be rendered academic and thereby not appealable, Viscount Simon LC said in *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 at pp 470–471:

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties. … … … I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

[9] The test, therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic. This test has found

favour with a plethora of local cases such as *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; *Datuk Syed Kechik bin Syed Mohamed & Anor v Board of Trustees of the Sabah Foundation & Ors* [1997] 1 MLJ 257 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513.

[10] There can be no dispute that if the appeal is ruled to be academic it will seriously affect the undertaking in damages given by the respondent. In *Ushers Brewery Ltd v PS King & Co* [1971] 2 All ER 468, Plowman J said that it is established law that an enquiry as to the damages to be assessed will not be ordered until either the plaintiff has failed on the merits at the trial or it is shown that the injunction ought not to have been granted in the first instance. He then referred to *Newby v Harrison* (1861) 3 De GF & J 287 and *Graham v Campbell* (1878) 7 Ch D 490 where the plaintiff failed at the trial and an enquiry was ordered and to *Ross v Buxton* (1888) WN 55 where an enquiry was ordered on the ground that the injunction was improperly obtained. In commenting on the proper time at which an enquiry as to damages must be held he said at p 473:

> No case was cited to me where the enquiry was ordered before the question whether the injunction was rightly granted had been disposed of.

[11] And at p 474:

> In the present case it would not in my judgment be appropriate to order an enquiry now, even though I am dissolving the injunction, because it has not been established that the injunction ought not to have been granted in the first instance.

[12] It is therefore clear that it is the appeal that will determine whether the orders ought not to have been granted in the first instance in order to enable the applicant to proceed further with the issue of the undertaking for damages. It follows that the fact that the orders have been dissolved cannot render the appeal academic.

[13] The corollary is that the preliminary objection raised by the respondent is devoid of any merit whatsoever and has only to be stated to be rejected. Accordingly, we dismissed it.

[14] The next matter for consideration is whether the orders made by the Court of Appeal on 25 October 2005 under s 44(1) are appealable under s 96(a). It is the contention of the applicant that they are appealable and in support advanced a well-researched and cogent argument. The respondent, who had initially contended that the orders are not appealable, changed its mind at the resumed hearing and said that they are appealable and, accordingly, had no objections to the motion for leave. That did not absolve us of the responsibility of delving deeper into the issues raised as they involve a question of jurisdiction. It is settled law that consent cannot confer jurisdiction where it does not exist. The question of the appealability of the orders made on 25 October 2005 thus requires a determination by this court notwithstanding the stand taken by the respondent.

[15] The appealability of the orders made on 25 October 2005 became the subject matter of argument, perhaps, due to the stand taken by Gopal Sri Ram JCA with whom Zulkefli Makinudin JCA agreed on the nature of the jurisdiction pursuant to which the orders were made under s 44(1). James Foong JCA expressed his own views. Their judgments are reported as Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd [2006] 1 MLJ 435. Gopal Sri Ram JCA said at pp 440–441:

> We are here exercising our original jurisdiction under s 44 of the Courts of Judicature Act 1964 ('CJA'). See *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2002] 4 MLJ 113. I am aware that in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1, Dzaiddin FCJ remarked by way of obiter that: 'It is trite that the Court of Appeal today no longer has any original jurisdiction'. That, with respect, is too wide and is an incorrect observation. It overlooks the actual wording of s 44 which reads:
>
> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceedings, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a judge of the Court of Appeal.
>
> (2) Every application under sub-s (1) shall be deemed to be a proceeding in the Court of Appeal.
>
> (3) Every order made under sub-s (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the court.
>
> It is important to notice that s 44(1) uses the words 'in any proceeding'. It does not say 'in any appeal'. Parliament has gone on to clarify the position in the second subsection which deems an application under s 44(1) to be a proceeding. And s 3 CJA defines 'proceeding' to mean any proceeding whatsoever of a civil or criminal nature and 'includes an application at any stage of a proceeding'. So, when this court makes an order under CJA s 44(1) it does not deal with the appeal proper at all. Hence it is a original jurisdiction, albeit a very limited one.
>
> Take this very case. The appeals by both sides have been heard and judgment reserved. All that remains is the giving of the decision and reasons for it. There is therefore no appeal pending before this court. We are asked to act under s 44 to grant interim protection between now and the date on which our decision will come. That, with respect is an invitation to exercise original jurisdiction and we can exercise it because of s 44.
>
> Since we are not exercising appellate jurisdiction in respect of a matter that originated in the High Court, an appeal to the Federal Court is not available. Similarly, there is no appeal from a decision of this court refusing leave to appeal. See *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549. It may have been different if we had been exercising our appellate jurisdiction in respect of a matter that originated in the High Court. In that event an appeal to the Federal Court would, in my respectful view, be competent despite the decisions in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65. This is because doubt has been cast over these cases by the majority judgments in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. Also, because, in my respectful view, both Lam Kong and Capital Insurance were wrongly decided and the dissent of Chong Siew Fai CJ (Sabah & Sarawak) in *Lam Kong* is correct.

[16] James Foong JCA said at pp 444–445:

> I have read the draft judgment of my learned brother, Justice Gopal Sri Ram. Though we both agreed to the conclusion arrived at and the material part of the contents therein, I am

A not in favour of the approach adopted in respect of how the Court of Appeal's jurisdiction is secured in dealing with this application of the appellant before us.

By the doctrine of 'stare decisis' the common law in this country has developed much in line with that inherited from the mother of common law — England. This means that the ratio decidendi from a judgment or decision of a more superior court is binding on all later courts
B under the system of judicial precedent. This is trite law.

I therefore feel that the Federal Court's decision in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65, in declaring that the Court of Appeal has no original jurisdiction, save and except, in the limited scope granted under s 44 of the Courts of Judicature Act to deal with
C 'any proceedings pending before the Court of Appeal' is binding on this court. The dissenting view of Chong Siew Fai (CJ Sabah & Sarawak) in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* over this point cannot be accepted as the correct state of law over the majority judgment of two other Federal Court judges who sat on that case.

In this instant case, I am of the view that since there is a pending proceeding before of this
D court where the decision in the appeal proper has yet to be delivered, though the appeal was argued, this court is clothe with jurisdiction to hear this notice of motion brought by the appellant for our consideration.

By this provision, I approached this motion and arrived at the conclusion which is similar to those of my other two brother judges in ordering the defendant be restrained from
E disposing or dissipating its assets up to RM100 million.

[17] It is first necessary to determine the nature of the jurisdiction under which the orders were made pursuant to s 44(1) before embarking on a consideration of their appealability. In ruling that an order made under s 44(1) is one that is made in the
F exercise of the original jurisdiction of the Court of Appeal, Gopal Sri Ram JCA noted that s 44(1) uses the word 'in any proceeding' and not 'in any appeal'. He then referred to the definition of 'proceeding' in s 3 of the Courts of Judicature Act 1964 ('s 3') and to s 44(2) which provides that every application under sub-s (1) shall be deemed to be a proceeding in the Court of Appeal. He then construed the word
G 'proceeding' in s 44(1) as a reference to the motion filed by the respondent. The conclusion of Gopal Sri Ram JCA is that since an order made under s 44(1) does not deal with the appeal proper at all it amounts to one made in the exercise of the original jurisdiction of the Court of Appeal. This raises the question of whether the 'proceeding' in this case for the purpose of s 44(1) contemplates the motion itself
H which is deemed to be a proceeding by s 44(2) or the appeal proper which is also a proceeding. It cannot be both but has to be one or the other. In determining the proper construction to be accorded to the word 'proceeding' in s 44(1) it must be observed that the meaning of a word given in an Act of Parliament cannot be blindly and slavishly applied each time it appears in the Act. This is made manifestly patent by section 3 itself which, like other definition provisions, makes the definitions
I provided applicable ' … … … unless the context otherwise requires … … … '. Thus, as SK Das J said in *Ram Narain v State of UP* AIR 1957 SC 18 at p 23:

> The meanings of words and expressions used in an Act must take their colour from the context in which they appear.

[18] In *Laxmana Rao v China* AIR 1980 Andh Pra 191, it was held that the meaning given to a particular expression by the definition clause is always subject to the context. The context in which the word is used may therefore render the meaning prescribed inapplicable. A

[19] The propriety of the process of reasoning adopted by the majority in the Court of Appeal in arriving at its conclusion that the word 'proceeding' in s 44(1) refers to the motion will become apparent if s 44(1) is read cautiously as a whole and with a proper appreciation of the meaning of the words 'pending' and 'hearing' in the section. *Black's Law Dictionary* (6th Ed) defines the word 'pending' as: B

> Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is 'pending' from its inception until the rendition of final judgment. C

[20] As Thomson J (as he then was) said in *Sockalinga Mudaliar v Eliathamby & Anor* [1952] MLJ 77 at p 78: D

> … I would adopt the following passage from Stroud's *Judicial Dictionary* (2nd Ed, p 1445):
>
> > A legal proceeding is 'pending' as soon as commenced … … … and until it is concluded, ie so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein. E

[21] Further reference may be made to *Goh Teng Hoon & Ors v Choi Hon Ching* [1987] 1 MLJ 95 where Sinnathuray J said at p 96:

> It would appear that there is no reported authority directly to the point on the word 'pending' in respect of an appeal from one court to another. Some assistance is to be had in Stroud's *Judicial Dictionary* on the meaning given to the word 'pending'. The first illustration explains that 'a legal proceeding is pending as soon as commenced, and until it is concluded, ie so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein'. It seems to me that a clear distinction has to be made between an appeal from a judgment and those other steps taken by way of execution of the judgment. On this, there is another illustration in Stroud's *Judicial Dictionary*: F G
>
> > As to what is a cause or proceeding 'pending' within Judicature Act 1873, now Judicature Act 1925, a cause is 'pending' even after final judgment, so long as such judgment remains unsatisfied … … … H
>
> In this context, I agree with Mr Liu for the respondent that garnishee proceedings are pending proceedings just as execution by way of writs are also pending proceedings.

[22] In commenting on the scope of the word 'hearing' Abdul Hamid Mohamad FCJ in writing for a five-member panel of this court said in *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia* [2006] 1 MLJ 403 at p 412: I

> First, we do not think that we should or could separate the date of hearing from the date of decision. The date fixed for a decision in fact forms part of the hearing. As always

A happens, even on the date fixed for decision, counsel still seek, and are usually allowed, unless the request is unreasonable, to make further submissions or to clarify a fact or to bring to the court's attention of a newly discovered authority or, as in this case, to inform the court of the latest development. The hearing of an application certainly includes the decision thereof.

B

[23] Having ascertained the meaning of the words 'pending' and 'hearing', it is now necessary to consider the orders that may be made under s 44(1). They are:

(a) any direction incidental thereto (that is to say, the proceeding) not involving the decision of the proceeding;

C

(b) any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding;

(c) any order for security for costs; and

D

(d) for the dismissal of a proceeding for default in furnishing security so ordered.

[24] Items (c) and (d) listed above are not relevant. In item (a), the order made must be one that does not involve the decision of the proceeding and in item (b) the order made must be one that is only pending the hearing of the proceeding. Thus, the order made must be one that does not involve the decision of the E proceeding or which is interim in nature pending the hearing of the proceeding. In other words, the proceeding itself must still be pending when orders in respect of it are made. It is only then that a matter will qualify as a 'proceeding' for the purpose of s 44(1). In this case, the orders made on 25 October 2005 involved a decision of the motion itself after it was heard resulting in it being disposed of. Thus, the orders F made cannot be said to be incidental or interim in nature in respect of the motion filed by the respondent as required by s 44(1) for the simple reason that it had been heard and decided and it was no longer a proceeding pending any hearing. Gopal Sri Ram JCA said that the fact that the appeal has been heard leaving only the giving of the decision meant that there is no appeal pending and that the making of an order G under s 44(1) pending the decision is therefore an exercise of original jurisdiction. The validity of this conclusion would depend on whether the appeal proper was a proceeding pending in the Court of Appeal when it had been heard with only the decision to be given. As stated earlier, the word 'pending' refers to a case from its inception till its conclusion while the word 'hearing' includes the decision on it. It is H thus abundantly clear that at the time the motion was heard the appeal proper was still pending in the Court of Appeal as, at that time, no decision had been given on it. The motion cannot therefore qualify as a 'proceeding' for the purpose of s 44(1) though, as provided by s 44(2), it is a proceeding in the Court of Appeal. The pending proceeding for the purpose of s 44(1) is nothing else but the appeal I itself. The conclusion of Gopal Sri Ram JCA based on an erroneous interpretation of the words 'pending' and 'hearing' must thus collapse as of necessity. Since the orders were made in relation to the pending appeal, the question of the existence of any original jurisdiction cannot and does not arise at all. The substratum of the argument of Gopal Sri Ram JCA that the orders were made in the exercise of the original jurisdiction of the Court as they do not deal with the appeal cannot therefore stand.

As a matter of fact, this question has been lucidly explained by Mohamed Dzaiddin FCJ (as he then was) in *Lam Kong Co Ltd v Thong Guan Co Ptd Ltd* [2000] 4 MLJ 1 at p 15:

> It is trite that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss 45–49 of the Act by the Courts of Judicature (Amendment) Act 1994 (Act A886). What remains is its criminal and civil appellate jurisdiction.

[25] Unfortunately, this view was summarily rejected by Gopal Sri Ram JCA. It is perhaps appropriate for us to reiterate that the Court of Appeal possesses only appellate jurisdiction.

[26] It is now apposite to consider whether the orders made on 25 October 2005 are appealable under s 96(a). The judgments of this court in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1, *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 and *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 show that they are not appealable. In order to appreciate the validity of the judgments in these cases, it is necessary to consider with care the language employed in s 96(a) which reads as follows:

> 96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage;

[27] Thus, what has been legislated to be appealable are judgments or orders of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction subject to fulfillment of the prescribed conditions. The critical issue for deliberation is whether this is restricted only to matters in which the High Court has made a decision or whether it also extends to decisions made by the Court of Appeal on matters arising from the decision of the High Court. This issue was considered by this court in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1. As Chong Siew Fai CJ (Sabah & Sarawak) said in his dissenting judgment at pp 10–11:

> One of the issues was that even assuming the accused had accepted a sum of Rs2400, could the receipt of that sum be held, in law, to be a premium in respect of the grant of a lease? Delivering the judgment of the court, Mahajan CJ made the following observation on the expression 'in respect of' (at p 498):
>
> > 'In respect of' means in its plain meaning 'connected with or attributable to', and therefore it is not necessary that there must be a simultaneous receipt by the landlord with the grant of the lease. So long as 'some connection' is established between the grant of the lease and the receipt of the premium by the landlord, the provisions of the section would be satisfied.

In the Australian case of *Trustees, Executors and Agency Co Ltd v Reilly* (1941) VLR 110 (facts therein are not relevant for our purpose) Mann CJ explained the words 'in respect of' thus (at p 111):

> The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.

To my mind the explanations of Mann CJ and Mahajan CJ in the above two cases aptly describe the ordinary meaning of the words 'in respect of'. Guided by the explanations, the words 'in respect of' in s 96(a) of the Act means, in my view, that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction. Applying the above construction of the three words to the case presently under appeal, the question is: Is there a connection or relation between the order of the Court of Appeal striking out the applicant's notice of appeal on the basis (which the applicant disputed) that leave to appeal was necessary but not obtained and the High Court's decision granting the relief sought in the action arising out of which the present appeal before us was brought. The High Court's decision is in respect of a 'civil cause decided by the High Court in the exercise of its original jurisdiction.' Hence, in my view, there clearly is an undisputable connection or relation between the said order of the Court of Appeal and the decision of the trial judge in the High Court.

It follows that s 96(a) of the Act is applicable in that the decision of the Court of Appeal made on 28 May 1998 in striking out the applicant's notice of appeal is appealable subject, of course, to leave of the Federal Court being granted.

[28] Mohamed Dzaiddin FCJ (as he then was) in delivering the majority judgment said at pp 16–17:

> So a question that arises is whether the instant application for leave to appeal is from the judgment or order of the Court of Appeal in respect of a civil cause or matter decided by the High Court. Clearly, the application is founded on the judgment of the Court of Appeal in a pending appeal made on an application by the respondent to strike out the applicant's notice of appeal on the ground that it was filed without leave of the Court of Appeal as required by s 68(1)(a) of the Act. In short, the instant application is not against the judgment of the Court of Appeal in respect of a civil cause or matter decided by the High Court on the merits.
>
> It is to be noted that Parliament has thought fit to impose conditions in respect of right of appeal from the Court of Appeal to the Federal Court under s 96(a) of the Act. The conditions are that leave of the Federal Court must be obtained and the matters that are appealable are from any judgment or order of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. On the true construction of s 96(a), we form the view that the judgment or order of the Court of Appeal to appeal from must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it. Unless there is an express provision that an appeal shall lie from the Court of Appeal to this court from its interlocutory judgment or order in respect of a matter pending appeal before it, by necessary intendment of s 96(a) the interlocutory judgment or order of the Court of Appeal is not appealable and does not come within the meaning of s 96(a) of the Act.

[29] And at p 18:

> In our view, based on the above statement of principles and in the context of s 96(a) of the Act, it is laudable, as a matter of policy, to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the Court of Appeal is in respect of any civil cause or matter decided by the High Court on the merits. If a decision of the Court of Appeal made on a motion in a pending appeal is appealable, then the result would be that there would be two appeals in every case 'in which, following the ordinary course of things, there would only be one'. Hence, the policy of requiring leave to appeal under s 96(a) to act as a 'filter' against unnecessary appeals would be defeated.

[30] The majority judgment was followed by this court in *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 and *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra Bhd* [2002] 1 MLJ 385.

[31] In *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1, Chong Siew Fai CJ (Sabah & Sarawak) took the view that the judgment or order of the Court of Appeal sought to be appealed against must be one which is in respect of a civil cause or matter decided by the High Court. However, Mohamed Dzaiddin FCJ (as he then was) in speaking for the majority said that the judgment or order sought to be appealed against must be one that is in respect of a cause or matter decided by the High Court on the merits and not one in respect of interlocutory judgments or orders decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal. He arrived at this conclusion based on his interpretation of s 96(a) and on policy considerations to restrict the right of appeal from the Court of Appeal to the Federal Court as in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549. The approach adopted raises two issues for consideration.

[32] As both the issues relate to the construction of a statutory provision dealing with the jurisdiction of courts, it is appropriate to consider them against the background of rules of interpretation peculiar to them. Reference must first be made to the statement of Tindal CJ in *Albon v Pyke* (1842) 4 M & G 421 when he said, in dealing with the jurisdiction of superior courts, at p 424:

> The general rule undoubtedly is that the jurisdiction of superior courts is not taken away except by express words or necessary implication.

[33] As the *Principles of Statutory Interpretation* (6th Ed) by G P Singh says at pp 445–446:

> As a necessary corollary of this rule provisions excluding jurisdiction of civil courts and provisions conferring jurisdiction on authorities and tribunals other than civil courts are strictly construed

[34] In *Prosunno Coomar Paul v Koylash Chunder Paul* 8 WR 428 Peacock CJ said at p 436:

> The jurisdiction of the ordinary Courts of Judicature is not to be taken away by putting a construction upon an Act of the Legislature which does not clearly say that it was the intention of the Legislature to deprive such courts of their jurisdiction.

[35] Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at pp 161–162:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

[36] The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v Singhai Kepurchand* 1976 Jab LJ 340). Thus the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacker & Sons Ltd v London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39). The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the state (see *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175; *Madhav Rao Scindia v Union of India* AIR 1971 SC 530).

[37] The first question that requires to be addressed is: Can s 96(a) be construed restrictively on policy considerations to limit the right of appeal to the Federal Court to only a judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court on the merits? In *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549, several English authorities were relied on to rule on such considerations that there can be no appeal on a refusal to grant leave to appeal. One of the cases is *Re Housing of the Working Classes Act 1890; ex p Stevenson* (1892) 1 QB 609 where it was held that the object of the requirement of obtaining leave to appeal ' … … … was to prevent frivolous and needless appeals. If, from an order refusing leave to appeal, there may be an appeal, the result will be that, in attempting to prevent needless and frivolous appeals, the legislature will have introduced a new series of appeals with regard to the leave to appeal. Suppose, for the sake of argument, that in this case the claimant's grounds for wishing to appeal are frivolous; if the contention on his behalf is correct, he could appeal from the judge at chambers to the Divisional Court, from the Divisional Court to this court, and from this court to the House of Lords on the question whether he shall be allowed to appeal. It appears to me that that would be an absurd result in the case of a provision the object of which is to prevent frivolous and needless appeals' (per Fry LJ at p 612). It is thus abundantly clear that the purpose of making a refusal of leave to appeal final is to ensure that the object of obtaining leave to appeal is not defeated. The purpose of

s 68(1)(a) is to prohibit appeals except with the leave of the Court of Appeal. To permit an appeal from a refusal of leave to appeal would defeat the object of s 68(1)(a) in preventing frivolous and unnecessary appeals. Bearing in mind the object of s 68(1)(a), it is necessary to make a decision of the Court of Appeal refusing leave final by necessary implication. That was the basis of the judgment in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 with which we agree. However, the motion before us is not in a similar position as it is an application that can be made only in this court. The reliance on policy considerations in the construction of s 96(a) as in the case of s 68(1)(a) cannot therefore be supported; it can only be resorted to as done in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 to render a refusal of leave to appeal final and not to construe a statutory provision rigidly against its plain meaning to reduce the number of cases where leave to appeal may be granted. Such an approach would militate against the rules relating to the construction of statutory provisions dealing with the jurisdiction of superior courts.

[38] The resultant question that requires to be addressed is whether the language of s 96(a) itself permits a restrictive construction. It must be observed that unlike s 68(1)(a), s 96(a) allows appeals from any judgment or order subject to fulfillment of the requirement stipulated therein. It is necessary to ascertain the meaning of the words 'judgment', 'order' and 'any' in s 96(a) in order to appreciate its proper scope. In commenting on the relationship between the words 'judgment' and 'order', Cotton LJ said in *Ex parte Chinery* (1884) 12 QBD 342 at p 345:

> Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order'. No doubt the Orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct.

[39] Black's *Law Dictionary* (6th Ed) defines a 'judgment' as:

> The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding. *Towley v King Arthur Rings, Inc* 40 NY 2d 129, 386 NYS 2d 80, 351 NE 2d 728, 730.

[40] Ramanatha Aiyar's *Advanced Law Lexicon* (3rd Ed) defines an 'order' as:

> An order is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some point collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution of the final judgment.

[41] A judgment is therefore a final determination of the rights of parties while an order is an interlocutory order made in relation to the judgment. They are therefore

A two separate and distinct concepts qualified only by the use of the word 'any' in s 96(a). Bindra's *Interpretation of Statutes* (9th Ed) in commenting on the word 'any' says at p 1469:

> 'Any' is a word which excludes limitation or qualification. It connotes wide generality.

B

[42] In *Aerlinte Eireann Teoranta v Canada (Minister of Transport)* (1990) 68 DLR (4th) 220, Heald JA said at p 225:

> In summary, then, the appellants' initial submission is to the effect that airlines can only be charged for airport facilities and services which they actually use. I am unable to agree with this submission. The trial judge carefully examined the language used in s 5 and concluded that the word 'any' as used in s 5 should be interpreted to mean 'all', 'each and every' or 'whichever'. He added (AB vol 19, p 3409): 'Thus 'at any airport' in s 5 includes among others the meaning 'at each and every, or whichever, airport' at which the Minister provides every and all, or whichever, facilities and services.' I agree with the conclusion of the trial judge.

C

D

[43] It is clear that the word 'any' in s 96(a) makes it applicable to every judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction. The judgments or orders of the Court of Appeal against which there can be an appeal are unqualified provided that they are in respect of any matter decided by the High Court. There is no requirement that the judgments or orders must be ones that have been decided by the High Court on the merits. The language of s 96(a) is plain enough to include matters decided by the Court of Appeal provided they are in respect of a matter decided by the High Court. The use of the words 'in respect of' in s 96(a) makes it clear that what is required is that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction as explained by Chong Siew Fai CJ (Sabah dan Sarawak). That is the plain meaning of s 96(a) and, accordingly, it must be construed in that sense. The fact that there can be no departure from the clear words of s 96(a) to restrict the number of appeals to this court is supported by the section itself which contains its own requirement to control the nature of cases where leave to appeal may be granted. The object of this requirement is to prevent frivolous and unnecessary appeals. The internal mechanism provided in s 96(a) is that the proposed appeal must involve a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage. If this requirement is not satisfied leave to appeal will not be granted (see *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257). It must be noted that there is no similar provision in s 68(1)(a). The wide language employed in s 96(a) together with the internal mechanism contained in it make it patent that it is the legislative intent to exclude a restrictive interpretation of the section.

E

F

G

H

I

[44] Thus, any restriction imposed on the right of appeal provided by s 96(a) in the absence of express words or necessary implication would defeat its object. It follows that any attempt to confine s 96(a) to only judgments or orders decided by the High Court on the merits cannot be justified. We are therefore, and with respect, unable

to subscribe to the interpretation accorded to s 96(a) by Mohamed Dzaiddin FCJ (as he then was). On the contrary, the dissenting judgment of Chong Siew Fai CJ (Sabah and Sarawak) is consistent with the language and spirit of s 96(a). Thus the majority judgment in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 cannot be sustained and, consequently, is not good law. The motion filed by the applicant for leave to appeal against the orders made by the Court of Appeal on 25 October 2005 is thus regular and competent.

[45] Gopal Sri Ram JCA is therefore correct in saying that *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 were wrongly decided. Unfortunately, he is not the right authority permitted by law to express such an opinion. As both cases are judgments of the Federal Court, he is bound to follow them whether he agrees with them or not. The stand taken by him is in blatant disregard of the doctrine of stare decisis particularly when the need to comply with this fundamental rule of the common law was brought to his attention by James Foong JCA in his separate judgment. In order to appreciate the importance of adhering to the doctrine of stare decisis useful references may be made to *Cassell & Co Ltd v Broome & Anor* [1972] 1 All ER 801 where Lord Hailsham said at p 809:

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said:
>
> > Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

[46] Gopal Sri Ram JCA himself, in recognising the importance of conforming with the doctrine of stare decisis, said in *Periasamy s/o Sinnappen v Public Prosecutor* [1996] 2 MLJ 557 at p 582:

> Lastly, the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did.
>
> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis.
>
> We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

A **[47]** We can only add that the castigation of a judge of the High Court for not respecting the doctrine of stare decisis must apply with greater force to a judge of the Court of Appeal.

[48] We allowed the motion for leave to appeal in terms of paragraph 6(b), (c) and
B (d) in encl 12 with costs to be costs in the cause.

Leave to appeal allowed.

Reported by Loo Lai Mee

C

D

E

F

G

H

I